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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN W. REGER, as Trustee in Bankruptcy, etc.,

Plaintiff and Respondent,

v.

GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO, LLP, et al.,

Defendants and Appellants.

G052352

(Super. Ct. No. 30-2015-00775712)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David T. McEachen, Judge. Motion for judicial notice denied. Order affirmed.

Nemecek & Cole, Jonathan B. Cole, Claudia L. Stone, Mark Schaeffer and Marshall R. Cole for Defendants and Appellants.

Parker Mills, David B. Parker, Joel A. Osman; Sall Spencer Callas & Krueger, Robert K. Sall and Brandon Krueger for Plaintiff and Respondent.

* * *

In this legal malpractice action, defendants Glaser Weil Fink Howard Avchen & Shapiro LLP, Patricia L. Glaser, and Craig H. Marcus (collectively, Glaser Weil) appeal from an order denying their petition to compel plaintiff John W. Reger, as Chapter 7 Trustee of the Bankruptcy Estate of James C. Coxeter, to arbitrate the claims in the lawsuit he filed against them. Glaser Weil defended Coxeter in earlier lawsuits brought by investors in a partnership Coxeter formed with his business partner, Robert Bisno. Bisno hired Glaser Weil at his own expense to jointly represent Bisno, Coxeter, and the partnership because the investors alleged Bisno had embezzled funds from the partnership and Coxeter denied any knowledge of the embezzlement. Coxeter separately hired Jackson, DeMarco, Tidus & Peckenpaugh (Jackson DeMarco) as his independent counsel to monitor Glaser Weil because of the potential conflicts of interest Glaser Weil faced in jointly representing all of the defendants in the investor lawsuits.

Glaser Weil petitioned to compel arbitration based on an arbitration provision in the firm's retainer agreement with Coxeter, and Jackson DeMarco joined in that petition because it did not have a separate arbitration agreement with Coxeter. The trial court denied the petition and joinder under Code of Civil Procedure section 1281.2, subdivision (c) (hereinafter, section 1281.2(c)), which grants the court discretion to deny arbitration in a dispute subject to an arbitration agreement when pending litigation with a third party creates the possibility of conflicting rulings on common factual or legal issues.[1] The court found the malpractice claims Reger alleged against Jackson DeMarco in this action constituted third-party litigation under section 1281.2(c).

Glaser Weil contends the trial court erred in finding Jackson DeMarco was a third party under section 1281.2(c) because Jackson DeMarco had standing to enforce the arbitration provision in Glaser Weil's retainer agreement on two separate theories. First, Glaser Weil contends Reger's complaint alleged a sufficiently close relationship

[1] All statutory references are to the Code of Civil Procedure.

between Glaser Weil and Jackson DeMarco that allowed Jackson DeMarco to enforce the arbitration agreement. Second, Glaser Weil contends Reger is equitably estopped to oppose arbitration based on the absence of an arbitration agreement between Coxeter and Jackson DeMarco because Reger's claims against the two firms are inextricably intertwined and arise from Glaser Weil's representation of Coxeter under the Glaser Weil retainer agreement, which included an arbitration provision. We reject both theories.

Glaser Weil forfeited its argument based on the allegedly close relationship between the two firms by failing to assert that argument in the trial court. Nonetheless, the argument lacks merit. Reger's complaint stated that an attorney associated with Jackson DeMarco that previously worked at Glaser Weil represented Patricia Glaser in an unrelated tax or estate planning matter. This relationship fails to establish a sufficient identity of interest between the two firms to make it equitable for Jackson DeMarco to enforce the arbitration provision. Glaser Weil's equitable estoppel theory fails because it applies only when a signatory asserts claims against a nonsignatory that are dependent upon, founded in, or inextricably intertwined with the contractual obligations of the agreement containing the arbitration provision; merely referring to or acknowledging the agreement is not sufficient. Reger's claims against Jackson DeMarco are based on the separate and independent duties that firm owed Coxeter. Reger makes no effort to enforce the Glaser Weil retainer agreement against Jackson DeMarco and in no way relies on that agreement as a basis for his claims against Jackson DeMarco.

Finally, Glaser Weil contends the trial court abused its discretion by denying arbitration under section 1281.2(c). Glaser Weil argues the court should have ordered Reger to arbitrate his claims against Glaser Weil, and then stayed either the arbitration or the court action on Reger's claims against Jackson DeMarco until the other claims were resolved. According to Glaser Weil, staying one action would have eliminated the possibility of conflicting rulings because the decision on the first set of claims "might" be binding on the second. Not so. Staying one set of claims would avoid

the possibility of conflicting rulings only if the decision on the first set of claims would apply to the second set of claims. The mere chance that it might be binding is not sufficient, and Glaser Weil failed to provide any authority or explanation to show the resolution of one set of claims would be binding on the other. The trial court therefore did not abuse its discretion by denying arbitration because the court avoided the risk of conflicting rulings by requiring the claims to be resolved in the same forum, at the same time, by the same decision maker. We therefore affirm the trial court's order.

I

FACTS AND PROCEDURAL HISTORY

In the early 1990's, Coxeter retained Glaser Weil partner Stanley Heyman to represent him on various tax and estate planning matters. In approximately 1998, Heyman left Glaser Weil and joined Jackson DeMarco, which thereafter represented Coxeter on various tax, estate planning, and other matters.

Coxeter and Bisno were business partners who formed two limited partnerships and solicited investors for those partnerships during the 1980's. Bisno embezzled funds from one of these partnerships without Coxeter's knowledge or participation. In the mid-2000's, several investors filed lawsuits against Coxeter, Bisno, and the partnerships based on Bisno's embezzlement.

In May 2006, Bisno at his own expense retained Glaser Weil to jointly represent him, Coxeter, and the partnerships in the investor lawsuits. A month later, Coxeter entered into a retainer agreement with Glaser Weil confirming it would represent him in the investor lawsuits and that Bisno would pay the attorney fees and costs. That agreement included an arbitration provision requiring Coxeter and Glaser Weil to arbitrate any disputes arising from Glaser Weil's representation. At the same time, Coxeter signed a separate agreement waiving any actual and potential conflicts of interest arising out of Glaser Weil's joint representation of Bisno, Coxeter, and the partnerships.

Coxeter also retained Jackson DeMarco to ensure Glaser Weil properly represented his interests because of the potential conflicting interests created by Glaser Weil's joint representation of Coxeter, Bisno, and the partnerships. Jackson DeMarco served in an "advisory role" concerning the investor lawsuits by "consult[ing] regarding Glaser Weil's representation, monitoring hearings, filings, depositions, motions and communications . . . as well as monitoring the representation, actions, prospective actions and strategy employed by [Glaser Weil]." In its retainer agreement with Coxeter, Glaser Weil acknowledged Coxeter had retained Jackson DeMarco as independent counsel and it agreed to keep Jackson DeMarco "regularly informed on the status of the litigation." Jackson DeMarco did not appear as counsel of record in the investor lawsuits. Moreover, Jackson DeMarco and Coxeter did not sign a written retainer agreement, nor did they have an arbitration agreement governing any dispute.

The claims of a few investors entitled to trial preference were tried in November 2006, with Glaser Weil representing Coxeter, Bisno, and the partnerships. A lawyer from Jackson DeMarco attended the trial and provided independent advice to Coxeter, but did not participate in the trial. The jury returned a verdict for the plaintiffs, finding Coxeter jointly and severally liable for Bisno's embezzlement and awarding the plaintiffs compound prejudgment interest on the embezzled funds.

In July 2007, one of the remaining investor plaintiffs served a section 998 offer to settle the plaintiff's claims against Coxeter for $1 million. Glaser Weil informed Jackson DeMarco, but both firms allowed the offer to expire. Instead, at Bisno's direction, Glaser Weil served a separate offer to compromise the plaintiff's claims against all the defendants for $1 million. The plaintiff rejected the offer.

In December 2008, Glaser Weil withdrew as counsel for all parties in the investor lawsuits, and Jackson DeMarco became Coxeter's counsel of record. Coxeter entered into a retainer agreement with Jackson DeMarco regarding this representation, but that agreement did not include an arbitration provision. Jackson DeMarco thereafter

settled the claims of the remaining investor plaintiffs except the plaintiff who made the section 998 settlement offer. That case went to trial in July 2009. The trial court ruled Coxeter was collaterally estopped to relitigate certain issues decided during the previous trial, including the availability of compound prejudgment interest. Based on the court's ruling, the jury returned a verdict against Coxeter for more than $1.4 million.

Coxeter was unable to pay this judgment and filed for bankruptcy protection. The bankruptcy court appointed Reger as the trustee for Coxeter's Chapter 7 bankruptcy estate, and in March 2015, Reger filed this action on Coxeter's behalf against Jackson DeMarco and Glaser Weil. Reger alleged claims for legal malpractice and breach of fiduciary duty against all defendants. Reger alleged Glaser Weil and Jackson DeMarco failed to adequately identify and disclose all the conflicting interests that arose from Glaser Weil's joint representation of Coxeter, Bisno, and the partnerships, failed to assert defenses available to Coxeter based on his status as an innocent partner who was unaware of Bisno's embezzlement, failed to properly oppose and make an adequate record to challenge the trial court's award of compound prejudgment interest, failed to properly advise Coxeter about the section 998 settlement offer, and failed to adequately advise Coxeter about other actions Glaser Weil took that favored Bisno over Coxeter.

Reger's complaint also included the following allegations concerning the relationship between Glaser Weil and Jackson DeMarco: "Jackson DeMarco had an undisclosed and preexisting relationship with [Patricia Glaser], arising from Heyman's past representation of [Patricia Glaser] in tax or estate planning matters, during his affiliation with Glaser Weil. . . . Heyman and [] Jackson DeMarco failed to disclose this preexisting relationship with [Patricia Glaser], such that Jackson DeMarco and Heyman would be unable to provide their complete and undivided loyalty to Coxeter, and to exercise independent judgment, when advising Coxeter regarding the actions of [Glaser Weil] in the [investor lawsuits]."

Based on the arbitration provision in its retainer agreement with Coxeter, Glaser Weil filed a petition to compel arbitration of Reger's claims. The same day, Jackson DeMarco filed a joinder in Glaser Weil's petition, asking the trial court to "order this matter and all parties to binding arbitration." Jackson DeMarco did not file its own petition to compel arbitration. Glaser Weil and Jackson DeMarco conceded Jackson DeMarco did not have an arbitration agreement with Coxeter, but argued Reger was equitably estopped to assert the lack of an arbitration agreement with Jackson DeMarco because his claims against the two firms were inextricably intertwined.

Reger opposed the petition and joinder, arguing he was not equitably estopped to assert the lack of an arbitration agreement with Jackson DeMarco, and therefore he could not be compelled to arbitrate his claims against that firm. Reger also argued the trial court should deny Glaser Weil's petition under section 1281.2(c) because his claims against Jackson DeMarco constituted pending litigation with a third party that could result in conflicting rulings on a common factual or legal issue if those claims were not jointly litigated.

The trial court denied both Glaser Weil's petition and Jackson DeMarco's joinder based on section 1281.2(c). In its statement of decision, the court explained Glaser Weil entered into an enforceable arbitration agreement with Coxeter, but Jackson DeMarco had no arbitration agreement with Coxeter, and there existed a possibility of conflicting rulings on a common factual or legal issue if all claims were not heard together because Reger's claims arose out of the same transaction or series of related transactions. The court rejected Glaser Weil's and Jackson DeMarco's equitable estoppel argument because it found the two were "separate and unrelated law firm[s]" and Reger based his claims against them on the independent duties the two firms owed to Coxeter. This appeal by Glaser Weil followed.[2]

[2] Jackson DeMarco separately appealed from the trial court's order to challenge the court's decision to deny its joinder in Glaser Weil's petition to compel

II

DISCUSSION

A. *The Trial Court's Authority to Deny Arbitration Based on Pending Litigation with Third Parties*

Section 1281.2 reflects California's strong public policy in favor of arbitration as a relatively quick and inexpensive method of dispute resolution. The statute requires a trial court to order parties to arbitration whenever a party establishes the existence of an arbitration agreement that applies to the dispute. (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 967 (*Acquire II*).) Section 1281.2(c), however, creates a statutory exception authorizing a trial court to refuse to enforce an arbitration agreement when pending litigation with a third party creates the possibility of conflicting rulings on common factual or legal issues. (§ 1281.2(c); *Acquire II*, at p. 967.)

"'"[S]ection 1281.2(c) is not a provision designed to limit the rights of parties who choose to arbitrate or otherwise to discourage the use of arbitration. Rather, it is part of California's statutory scheme designed to enforce the parties' arbitration agreements . . . . Section 1281.2(c) addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement. The California provision giving the court discretion not to enforce the arbitration agreement under such circumstances—in order to avoid potential inconsistency in outcome as well as duplication of effort—"' is consistent with the policy of encouraging arbitration." (*Abaya v. Spanish Ranch I, L.P.* (2010) 189 Cal.App.4th

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arbitration. (*Reger v. Jackson DeMarco Tidus & Peckenpaugh* (G052477.) We previously denied a motion to consolidate the two appeals, but set them for oral argument at the same time.

1490, 1497 (*Abaya*), quoting *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393.)

This third-party litigation exception applies when (1) "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party"; (2) the third-party action "aris[es] out of the same transaction or series of related transactions"; and (3) "there is a possibility of conflicting rulings on a common issue of law or fact." (§ 1281.2(c); *Acquire II*, *supra*, 213 Cal.App.4th at pp. 967-968.) If all three of these conditions are satisfied, section 1281.2(c) grants the trial court the discretion to refuse to enforce the arbitration agreement and order the parties to litigate all claims, or stay either the arbitration or litigation while the other proceeds.[3] (*Acquire II*, at p. 968; see § 1281.2(c).) "A trial court has no discretion to deny or stay arbitration unless all three of section 1281.2(c)'s conditions are satisfied." (*Acquire II*, at p. 968.)

Under section 1281.2(c), a third party is anyone who is not bound by the arbitration agreement. (*Acquire II*, *supra*, 213 Cal.App.4th at p. 977; *Bush v. Horizon West* (2012) 205 Cal.App.4th 924, 928.) If a person has standing to invoke an arbitration agreement or may be compelled to arbitrate under its terms despite being a nonsignatory to the agreement, the person is not a third party and arbitration may not be denied or stayed under section 1281.2(c). (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 706 (*Molecular Analytical*); *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1290 (*Rowe*).)

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[3] "Specifically, section 1281.2(c) identifies four options from which the court may choose: (1) 'refuse to enforce the arbitration agreement and . . . order intervention or joinder of all parties in a single action or special proceeding'; (2) 'order intervention or joinder as to all or only certain issues'; (3) 'order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding'; and (4) 'stay arbitration pending the outcome of the court action or special proceeding.'" (*Acquire II*, *supra*, 213 Cal.App.4th at p. 968.)

A trial court's decision whether section 1281.2(c), applies is reviewed under either the substantial evidence or de novo standard depending on the basis for the court's decision. "If the court based its decision on a legal determination, then we adopt the de novo standard. [Citations.] If the court based its decision on a factual determination, then we adopt the substantial evidence standard of review. [Citation.] Whether there are conflicting issues arising out of related transactions is a factual determination subject to review under the substantial evidence standard." (*Acquire II, supra*, 213 Cal.App.4th at p. 972.) "When section 1281.2(c) applies, 'the trial court's discretionary decision as to whether to stay or deny arbitration is subject to review for abuse.'" (*Acquire II*, at p. 971.)

B. *The Trial Court Properly Determined Section 1281.2(c) Applied*

In challenging the trial court's decision to deny the petition to compel arbitration based on section 1281.2(c), Glaser Weil does not dispute the claims against it and Jackson DeMarco arise out of the same transaction or series of related transactions, nor does Glaser Weil dispute there is a possibility of conflicting rulings on a common factual or legal issue if one set of claims is litigated while the other is arbitrated. Rather, Glaser Weil challenges only the trial court's determination that Jackson DeMarco is a third party within the meaning of section 1281.2(c). According to Glaser Weil, Jackson DeMarco had standing to enforce the arbitration provision in Glaser Weil's retainer agreement with Coxeter, and therefore Jackson DeMarco was not a third party whose involvement could support the trial court's application of section 1281.2(c). Glaser Weil argues Jackson DeMarco had standing based on two separate theories, and we address each of them below.[4]

[4] We deem waived all challenges to the other two prerequisites for section 1281.2(c)'s application because Glaser Weil has not contested the trial court's conclusion those elements were satisfied. (*Gilkyson v. Disney Enterprises, Inc.* (2016)

1. Glaser Weil Failed to Establish a Relationship With Jackson DeMarco That Would Allow Jackson DeMarco to Enforce the Arbitration Agreement

Glaser Weil first contends Jackson DeMarco had standing to enforce the arbitration provision in Glaser Weil's retainer agreement because Reger alleged a close relationship existed between the two firms that effectively made Jackson DeMarco an agent of Glaser Weil. This contention lacks merit.

Procedurally, Glaser Weil forfeited this argument by failing to raise it in the trial court. Glaser Weil criticizes the trial court for "ignor[ing]" Reger's allegation about a close relationship between Glaser Weil and Jackson DeMarco, and the governing law allowing a nonsignatory to enforce an arbitration agreement when he or she has a close, preexisting relationship with a signatory to the agreement. The trial court, however, did not ignore either this allegation or law. Rather, Glaser Weil failed to bring them to the trial court's attention, and therefore forfeited this argument. (*Golden State Water Co. v. Casitas Municipal Water Dist.* (2015) 235 Cal.App.4th 1246, 1259 ["In any event, [appellant] has forfeited this argument by failing to raise it below"].)

Substantively, Glaser Weil would not have prevailed even if they had raised the argument below.

Arbitration is a matter of contract, and a person generally """must be a party to an arbitration agreement to be bound by it or invoke it."""" (*DMS Services, LLC v. Superior Court* (2012) 205 Cal.App.4th 1346, 1352 (*DMS Services*).) Although California has a strong public policy favoring arbitration, """"there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. . . ."""" (*Ibid.*)

Case law recognizes six theories that constitute "limited exceptions" to the general prohibition that a nonsignatory may not enforce an arbitration agreement or have

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244 Cal.App.4th 1336, 1347 ["'[w]hen an appellant fails to raise a point . . . we treat the point as waived'"].)

one enforced against it. (*DMS Services*, *supra*, 205 Cal.App.4th at p. 1353; see *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513 (*Suh*).) These theories are (1) incorporation by reference; (2) assumption of obligations; (3) agency; (4) alter ego; (5) third-party beneficiary; and (6) equitable estoppel. (*DMS Services*, at p. 1353; *Suh*, at p. 1513 [collecting cases]; see *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 268; see *Valley Casework, Inc. v. Comfort Construction, Inc.* (1999) 76 Cal.App.4th 1013, 1021-1022 (*Valley Casework*).)

Each of these exceptions is based on a significant relationship between the nonsignatory and a signatory that makes it equitable either to enforce the arbitration agreement against the nonsignatory or to allow the nonsignatory to enforce the agreement against a signatory. (*DMS Services*, *supra*, 205 Cal.App.4th at p. 1353 ["These exceptions . . . 'generally are based on the existence of a relationship between the nonsignatory and the signatory, such as principal and agent or employer and employee, where a sufficient "identity of interest" exists between them'"]; *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 18, fn. 9 (*Jones*); *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 765 (*Westra*) ["A nonsignatory to an agreement to arbitrate may be required to arbitrate, and may invoke arbitration against a party, if a preexisting confidential relationship, such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate upon the nonsignatory"]; *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 76 (*NORCAL*) ["The common thread of all the above cases is the existence of an agency or similar relationship between the nonsignatory and one of the parties to the arbitration agreement"].)

For example, in *Wolschlaer v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784, a sufficient relationship existed because the nonsignatory had an existing contractual relationship with a signatory that incorporated the arbitration agreement by reference. (*Id*. at pp. 790-791.) In *Marenco v. DirecTV LLC* (2015)

233 Cal.App.4th 1409 (*Marenco*), a sufficient relationship existed because a nonsignatory corporation had acquired a signatory corporation and assumed the signatory's rights and obligations. (*Id*. at pp. 1417-1419.) In *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406 (*Dryer*), a sufficient relationship existed because the nonsignatories were sued based on acts they took as the agents of a signatory. (*Id*. at p. 418.) In *Rowe*, a sufficient relationship existed because the nonsignatories were sued as the alter egos of a signatory. (*Rowe*, *supra*, 153 Cal.App.4th at pp. 1285.) Finally, in *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, a sufficient relationship existed because the nonsignatory was a third party beneficiary who received benefits under the contract containing an arbitration provision. (*Id*. at 1520.)

The nonsignatory seeking to enforce an arbitration agreement bears the burden to establish a sufficient relationship with a signatory that allows the nonsignatory to enforce the agreement. (*Jones*, *supra*, 195 Cal.App.4th at p. 15.) We review the trial court's determination whether a nonsignatory may enforce an arbitration agreement under the de novo standard. (*Marenco*, *supra*, 233 Cal.App.4th at pp. 1416-1417; *DMS Services*, *supra*, 205 Cal.App.4th at p. 1352.)

Here, Glaser Weil contends a sufficient relationship exists between Jackson DeMarco and Glaser Weil because Reger's complaint alleged "Jackson DeMarco was in effect the agent of [Glaser Weil]." Specifically, Glaser Weil points to the allegation that Jackson DeMarco had an undisclosed and preexisting relationship with Patricia Glaser based on Heyman's representation of her in unrelated tax or estate planning matters during his affiliation with Glaser Weil, and that relationship prevented Heyman and Jackson DeMarco from providing undivided loyalty and exercising independent judgment when they monitored Glaser Weil's joint representation of Coxeter and the other defendants in the investor lawsuits. In support, Glaser Weil provides a number of generic soundbites from cases regarding nonsignatories enforcing arbitration agreements, but fails to provide any analysis or explanation how those cases apply to the specific facts

presented here. (See *Dryer*, *supra*, 40 Cal.3d at p. 418; *Marenco*, *supra*, 233 Cal.App.4th at p. 1417; *JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1240 (*JSM Tuscany*); *Rowe*, *supra*, 153 Cal.App.4th at p. 1284; *Westra*, *supra*, 129 Cal.App.4th at pp. 763-767; *NORCAL*, *supra*, 84 Cal.App.4th at p. 76; *Valley Casework*, *supra*, 76 Cal.App.4th at p. 1021; *Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1319 (*Izzi*), overruled on other grounds in *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 250; *Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999, 1004 (*Berman*).)

"On appeal, a judgment [or order] of the trial court is presumed to be correct." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) The appellant bears the burden to "'affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority.'" (*Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 218.) The failure to do any of these things forfeits the argument. (*Id*. at pp. 217-218; *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 743.) Statements of general legal principles and citations to legal authorities without discussing and analyzing how they apply to the specific facts of the case presented are not sufficient. (*Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 862; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

In relying on the foregoing cases, Glaser Weil fails to identify the nature of the relationship between the nonsignatories and the signatories to the arbitration agreements in any of those cases. Similarly, Glaser Weil makes no attempt to describe the facts of those cases, let alone analogize those facts to the facts presented here. Glaser Weil does not even state whether the court enforced the arbitration agreement in any of the cases. This is patently insufficient to meet Glaser Weil's burden on appeal.

Moreover, our review of these cases reveals that none of them supports Glaser Weil's position. Four of the cases involved an agency relationship where the nonsignatory was sued for acts he or she took as the signatory's agent. (*Dryer*, *supra*,

40 Cal.3d at p. 418; *Westra*, *supra*, 129 Cal.App.4th at pp. 765-767; *Izzi*, *supra*, 186 Cal.App.3d at p. 1319; *Berman*, *supra*, 44 Cal.App.3d at p. 1004.) One of the cases involved a nonsignatory who was sued as the alter ego of a signatory to the arbitration agreement. (*Rowe*, *supra*, 153 Cal.App.4th at pp. 1284-1285.) Another case involved a corporation that acquired a signatory corporation and assumed all of its rights and obligations. (*Marenco*, *supra*, 233 Cal.App.4th at pp. 1417-1420.) One case involved an insurance coverage dispute by a nonsignatory who was the wife of and worked for the signatory insured, and also accepted benefits under the insurance policy containing the arbitration provision. (*NORCAL*, *supra*, 84 Cal.App.4th at pp. 76-84.) The final two cases refused to allow the nonsignatory to enforce the arbitration agreement because the evidence failed to establish a sufficient relationship between the nonsignatory and a signatory. (*JSM Tuscany*, *supra*, 193 Cal.App.4th at pp. 1241-1245; *Valley Casework*, *supra*, 76 Cal.App.4th at pp. 1024.)

Jackson DeMarco is neither an agent nor alter ego of Glaser Weil. Jackson DeMarco did not assume any of Glaser Weil's rights or obligations under Glaser Weil's retainer agreement with Coxeter, Jackson DeMarco is not a third party beneficiary of that retainer agreement, and neither Jackson DeMarco nor Glaser Weil accepted or sought any benefits under the other's agreement with Coxeter. Jackson DeMarco and Glaser Weil are separate and independent law firms that entered into separate retainer agreements with Coxeter, and neither agreement incorporated nor referred to the other's retainer agreement.

Although both firms represented Coxeter in the investor lawsuits, their interests and responsibility in doing so were different. Bisno hired Glaser Weil to jointly represent Bisno, Coxeter, and all other defendants at Bisno's expense. Coxeter hired and paid Jackson DeMarco to serve as independent counsel and monitor Glaser Weil's representation of Coxeter because of the potential conflicts of interest that arose from Glaser Weil jointly representing all defendants. Reger sued each firm for breaching the

independent duties they each owed Coxeter. He does not seek to hold either firm liable for the actions of the other firm, nor does he allege either firm took any action on behalf of the other. This relationship is not comparable to any of the relationships that allowed a nonsignatory to enforce an arbitration agreement in the cases relied on by Glaser Weil, and Glaser Weil points to nothing about this relationship that would make it equitable to allow Jackson DeMarco to enforce the arbitration provision in Glaser Weil's retainer agreement.

Reger's allegation that Heyman previously represented Patricia Glaser on an unrelated tax or estate planning matter when he worked at Glaser Weill does not alter our analysis. Although Reger alleged that previous representation created a conflict of interest that prevented Jackson DeMarco from exercising independent judgment while monitoring Glaser Weil's joint representation of all defendants in the investor lawsuits, that alleged conflict of interest has no bearing on our determination whether Jackson DeMarco has standing as a nonsignatory to enforce the arbitration provision in Glaser Weil's retainer agreement.[5]

It is not just any relationship with a signatory to an arbitration agreement that allows a nonsignatory to enforce the agreement. As the foregoing authorities establish, a nonsignatory must have a relationship with a signatory that creates a sufficient identity of interest between the two that makes it equitable to allow the nonsignatory to enforce the arbitration agreement or to enforce the agreement against the nonsignatory. (See, e.g., *DMS Services*, *supra*, 205 Cal.App.4th at p. 1353; *Westra*, *supra*, 129 Cal.App.4th at p. 765; *NORCAL*, *supra*, 84 Cal.App.4th at p. 76.) Heyman's previous representation of Patricia Glaser, even when combined with Reger's allegation regarding the purported conflict of interest that relationship created, is completely

[5] In deciding this appeal, we express no opinion on whether the relationship Reger alleged created a conflict of interest.

unrelated to the representations at issue in this case and has no connection to Glaser Weil's retainer agreement and its arbitration provision.

2. Glaser Weil Failed to Establish Reger Was Equitably Estopped to Assert Jackson DeMarco's Nonsignatory Status

Glaser Weil next argues Reger is equitably estopped from asserting Jackson DeMarco's nonsignatory status because Reger's claims against both Jackson DeMarco and Glaser Weil arise from Glaser Weil's representation of Coxeter under the Glaser Weil retainer agreement. We disagree. Glaser Weil misconstrues both the governing legal standard and Reger's claims.

In the arbitration context, the doctrine of equitable estoppel permits a nonsignatory to enforce an arbitration agreement "where, for example, a signatory plaintiff sues a nonsignatory defendant for claims that are based on an underlying contract. In such instance, the plaintiff may be equitably estopped to deny the nonsignatory defendant's right to enforce an arbitration clause that is contained within the contract that the plaintiff has placed at issue." (*Marenco*, *supra*, 233 Cal.App.4th at p. 1417.)

The purpose of the doctrine is "'to prevent a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of that same agreement.' [Citation.] Application of the doctrine in a proper case is not unfair to signatory plaintiffs resisting arbitration: Not only have such plaintiffs 'decided the theories on which to sue' the nonsignatory, they also have 'consented to arbitrate the claims against [the signatory defendant] anyway.'" (*JSM Tuscany, supra*, 193 Cal.App.4th at p. 1238.)

"[T]he sine qua non for application of equitable estoppel as the basis for allowing a nonsignatory to enforce an arbitration clause is that the claims plaintiff asserts against the nonsignatory must be dependent upon, or founded in and inextricably

intertwined with, the underlying contractual obligations of the agreement containing the arbitration clause." (*Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 217-218 (*Goldman*).) "[M]erely 'mak[ing] reference to' an agreement with an arbitration clause is not enough. Equitable estoppel applies 'when the signatory to a written agreement containing an arbitration clause "must rely on the terms of the written agreement in asserting [its] claims" against the nonsignatory.'" (*Id*. at p. 218.)

"In *any* case applying equitable estoppel to compel arbitration despite the lack of an agreement to arbitrate, a nonsignatory may compel arbitration only when the claims against the nonsignatory are founded in and inextricably bound up with *the obligations imposed by the agreement containing the arbitration clause*. In other words, allegations of substantially interdependent and concerted misconduct by signatories and nonsignatories, standing alone, are not enough: the allegations of interdependent misconduct must be founded in or intimately connected with the obligations of the underlying agreement." (*Goldman*, *supra*, 173 Cal.App.4th at p. 219.)

"Because equitable estoppel applies only if the plaintiffs' claims against the nonsignatory are dependent upon, or inextricably bound up with, the obligations imposed by the contract plaintiff has signed with the signatory defendant, [courts must] examine the facts alleged in the complaint[to determine whether the doctrine applies]." (*Goldman*, *supra*, 173 Cal.App.4th at pp. 229-230.) Whether the doctrine of equitable estoppel applies generally is a question of fact we review under the substantial evidence standard, but we review the question de novo when, as here, the facts are undisputed because they are limited to the allegations of the plaintiff's complaint. (*Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1716; see *Molecular Analytical*, *supra*, 186 Cal.App.4th at p. 708.)

For example, in *Goldman*, the Court of Appeal concluded the doctrine did not apply because the signatory plaintiffs' complaint against the nonsignatory defendants "[did] not rely on or use any terms or obligations of the . . . agreements as a foundation

for their claims." (*Goldman*, *supra*, 173 Cal.App.4th at p. 218.) There, the plaintiffs sued their former accountants, lawyers, and investment advisers for developing a fraudulent tax shelter scheme that resulted in losses for the plaintiffs. One step in the scheme included establishing a limited liability company governed by an operating agreement that included a broad arbitration provision. The plaintiffs and their investment advisors signed that agreement and became members of the limited liability company, but the accountants and lawyers did not. (*Id*. at p. 213.) The accountants and lawyers nonetheless moved to compel arbitration based on the arbitration provision in the operating agreement, arguing the plaintiffs were equitably estopped to raise the accountants' and lawyers' status as nonsignatories because the plaintiffs' claims were founded on the operating agreement and alleged "interdependent and concerted misconduct" by the nonsignatory accountants and lawyers, and the signatory investment advisors. (*Id*. at pp. 216-217.) The trial court denied the motion to compel arbitration and the Court of Appeal affirmed, explaining the doctrine of equitable estoppel did not apply because the plaintiffs' "allegations depend solely on the actions of [the accountants and lawyers], not on the terms of the operating agreement for their success." (*Id*. at p. 230; see *DMS Services*, *supra*, 205 Cal.App.4th at pp. 1354-1355 [equitable estoppel doctrine did not apply because plaintiff's claims against nonsignatory defendant did not rely on any provision in agreement containing arbitration provision]; *Jones*, *supra*, 195 Cal.App.4th at pp. 21-22 [same].)

Here, equitable estoppel likewise does not apply to prevent Reger from asserting Jackson DeMarco's status as a nonsignatory to Glaser Weil's retainer agreement and its arbitration provision. Reger's claims against Jackson DeMarco are not dependent upon, founded in, or inextricably intertwined with the contractual obligations of the Glaser Weil retainer agreement. Reger sued Jackson DeMarco for legal malpractice and breach of fiduciary duty based on its breach of the separate duties

Jackson DeMarco owed Coxeter as his independent counsel. The Glaser Weil retainer agreement is not the source of any duty Reger claims Jackson DeMarco breached.

The Glaser Weil retainer agreement and Glaser Weil's representation of Coxeter under that agreement may provide the context for some of the misconduct in which Reger alleged Jackson DeMarco engaged. For example, Reger alleged Jackson DeMarco failed to advise Coxeter that Glaser Weil was favoring Bisno's interests over Coxeter's interest in Glaser Weil's joint representation of Bisno and Coxeter in the investor lawsuits. But Reger does not claim Jackson DeMarco had or breached any obligation under the Glaser Weil retainer agreement, that Jackson DeMarco is liable for Glaser Weil's breach of any contractual obligations imposed by the Glaser Weil retainer agreement, or even that Jackson DeMarco induced or otherwise caused a breach of the Glaser Weil retainer agreement. Glaser Weil does not point to a single allegation in Reger's complaint that relies on the terms of the Glaser Weil retainer agreement to support its claim against Jackson DeMarco.

In the words of the *Goldman* court, "[Glaser Weil] simply omit[s] the necessary central core of the standard: the plaintiff's allegations must rely on or depend on '"the terms of the written agreement"' [citation], not simply on the fact that an agreement exists." (*Goldman, supra*, 173 Cal.App.4th at p. 231.) Indeed, although the Glaser Weil retainer agreement "'may play a role in the ultimate outcome of this suit, it is not a part of [Reger's] causes of action. . . . In this case, [Reger is] not trying to "have it both ways" [by seeking to hold Jackson DeMarco liable pursuant to duties imposed by the Glaser Weil retainer agreement, but at the same time denying applicability of the agreement's arbitration clause] because [Reger is] not relying on the [Glaser Weil retainer agreement] to hold [Jackson DeMarco] liable. As a result, equitable estoppel does not permit [Jackson DeMarco] to enforce the arbitration agreement.'" (*Ibid*.)

Glaser Weil contends equitable estoppel allows Jackson DeMarco to enforce the arbitration clause in Glaser Weil's retainer agreement because Reger's claims

against Jackson DeMarco would not exist but for that agreement. "But for" causation, however, is not the standard for determining whether equitable estoppel applies to allow a nonsignatory to enforce an arbitration agreement. (*DMS Services*, *supra*, 205 Cal.App.4th at pp. 1356-1357.) Although Reger's claims against Jackson DeMarco for inadequately monitoring Glaser Weil's representation would not exist but for Glaser Weil's retainer agreement with Coxeter, it does not legally follow that Reger's claims against Jackson DeMarco are dependent upon, founded in, or inextricably intertwined with the contractual obligations of the Glaser Weil retainer agreement. (*Ibid*.) Reger's claims are based on Jackson DeMarco's independent duties, not the terms of the Glaser Weil retainer agreement.

Glaser Weil also argues equitable estoppel applies because Reger's claims against Jackson DeMarco are inextricably intertwined with Reger's claims against Glaser Weil and the two sets of claims share common factual and legal issues. This contention, however, conflates the standard for determining whether section 1281.2(c) applies, and the standard for determining whether a signatory is equitably estopped to oppose arbitration with a nonsignatory. As explained above, section 1281.2(c) applies when a party to a dispute covered by an arbitration agreement also is involved in pending litigation with a third party that creates the possibility of conflicting ruling on factual or legal issues common to both proceedings. (§ 1281.2(c); *Acquire II*, *supra*, 213 Cal.App.4th at pp. 967-968.) Section 1281.2(c) allows the court to avoid conflicting rulings by either requiring the two sets of claims to be decided together, or one set to be decided before the other. (*Acquire II*, at p. 978; *Abaya*, *supra*, 189 Cal.App.4th at p. 1497.)

In contrast, equitable estoppel applies when a signatory's claims against a nonsignatory are dependent upon, founded in, or inextricably intertwined with the obligations of the agreement containing the arbitration provision. (*Goldman*, *supra*, 173 Cal.App.4th at pp. 217-218.) Its purpose is to prevent a party from using the terms

or obligations of an agreement as the basis for claims against a nonsignatory while simultaneously refusing to arbitrate with that nonsignatory under another clause of that same agreement. (*JSM Tuscany*, *supra*, 193 Cal.App.4th at p. 1238.) Whether Reger's claims against Jackson DeMarco share common issues or are inextricably intertwined with Reger's claims against Glaser Weil is irrelevant to determining whether equitable estoppel applies. The determinative factor in the equitable estoppel analysis is the relationship between Reger's claims against Jackson DeMarco and the terms of the Glaser Weil retainer agreement, not the relationship between Reger's claims against Jackson DeMarco and his claims against Glaser Weil. (See *DMS Services, supra*, 205 Cal.App.4th at p. 1357 ["commonality of issues is a far cry from claims grounded in, and 'inextricably intertwined with,' the arbitration agreement"].) The required relationship between Reger's claims against Jackson DeMarco and the Glaser Weil retainer agreement is lacking, and the trial court therefore properly concluded equitable estoppel did not apply.

C. *The Trial Court Did Not Abuse Its Discretion By Denying Arbitration Based on Reger's Claims Against Jackson DeMarco*

Glaser Weil also contends the trial court abused its discretion by denying arbitration under section 1281.2(c) instead of ordering Reger to arbitrate his claims against Glaser Weil, and then either staying the arbitration or the court action on Reger's claims against Jackson DeMarco until deciding the other set of claims. According to Glaser Weil, the court would have avoided the possibility of conflicting rulings on any common questions of fact or law because "[t]he ruling from one forum (e.g., litigation between Reger and Jackson DeMarco) *might then be binding* on the other (arbitration between Reger and [Glaser Weil])." (Italics added.) Not so.

Ordering arbitration on Reger's claims against Glaser Weil and then staying either that arbitration or the court action on Reger's claims against Jackson DeMarco would not avoid the possibility of conflicting rulings if the decision in one of those

forums simply "might" be binding in the other forum. To the contrary, unless Glaser Weil showed the ruling in one forum *will be binding* in the other forum, staying the proceedings in one forum while the other forum proceeds fails to eliminate the possibility of conflicting rulings and deprives the trial court of any means to prevent conflicting rulings if the trier of fact's conclusion in the first forum are not binding in the second.

For example, if the trial court ordered Reger to arbitrate his claims against Glaser Weil and stayed the court action on Reger's claims against Jackson DeMarco while the arbitration proceeded, the arbitrator might find Glaser Weil not liable because it did not cause Coxeter's damages. The trial court then could determine that ruling is not binding on Jackson DeMarco and the jury could conclude Jackson DeMarco was not liable because Glaser Weil caused all of Coxeter's damages. In that scenario, conflicting rulings would deprive Reger of any recovery, but the trial court could do nothing to avoid that outcome because it had allowed separate resolution of the two sets of claims.

Glaser Weil did not present any authority or explanation to show that the ruling from one forum necessarily would be binding in the other forum, and therefore failed to show its proposal to allow the claims to proceed one set at a time in separate forums would eliminate the possibility of conflicting rulings. In contrast, the trial court's decision to deny arbitration eliminates the possibility of conflicting rulings by requiring the parties to litigate all of Reger's claims in one forum before a single decision maker.

"An abuse of discretion may be found only if '"no judge could have reasonably reached the challenged result. [Citation.] '[A]s long as there exists "a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be . . . set aside . . . ."'"'" (*O'Donoghue v. Superior Court* (2013) 219 Cal.App.4th 245, 269.) Glaser Weil failed to show no judge would have reached the trial court's conclusion.[6]

[6] Glaser Weil filed a motion asking us to judicially notice a brief and declaration Reger filed in the trial court to oppose Jackson DeMarco's motion to

III

DISPOSITION

The order denying Glaser Weil's petition to compel arbitration is affirmed. Reger shall recover his costs on appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.

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disqualify one of Reger's attorneys. According to Glaser Weil, Reger opposed its petition to compel arbitration by arguing his claims against Glaser Weil and Jackson DeMarco are inseparable and must be decided together, but these documents show Reger later changed his position and argued the two sets of claims were separable and could be tried separately. Glaser Weil contends we should consider these documents in deciding whether the trial court abused its discretion in denying arbitration in its entirety instead of ordering arbitration and then staying either the arbitration or the court proceedings.

We deny the motion. Absent exceptional circumstances, reviewing courts generally do not judicially notice documents that were not before the trial court at the time it made the challenged ruling. (*Vons Companies, Inc. v. Seabest Food, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *LaGrone v. City of Oakland* (2011) 202 Cal.App.4th 932, 946, fn. 6.) Glaser Weil failed to show any exceptional circumstances that support deviating from this general rule. As documents filed after the trial court denied the petition to compel arbitration, these documents do not show the trial court abused its discretion when ruling on the petition.